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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEVEN MARKOFF et al.,

Plaintiffs and Respondents,

v.

VIDALA AARONOFF,

Defendant and Appellant.

B204532

(Los Angeles County
Super. Ct. No. SC080757)

APPEAL from orders of the Superior Court of Los Angeles County, Joseph S. Biderman. Reversed in part, affirmed in part, and dismissed.

Steven J. Aaronoff for Defendant and Appellant.

Hawley Troxell Ennis & Hawley and John F. Kurtz for Plaintiffs and Respondents.

## I.

## INTRODUCTION

Steven Markoff and Jadwiga Markoff entered into an enforceable joint venture agreement with Vidala Aaronoff on May 17, 2002, to develop an apartment building after Aaronoff had entered into a purchase agreement to buy the building. Thereafter, the Markoffs sued Aaronoff for breach of the joint venture contract. After a jury trial in favor of Aaronoff, the trial court awarded her attorney fees. In these consolidated appeals, the Markoffs contend the trial court erred in issuing the attorney fee award and Aaronoff contends the trial court abused it discretion in calculating the amount of the award.

We conclude there is no legal basis for the imposition of attorney fees against the Markoffs because there is no attorney fee provision in the contract of May 17, 2002, which, according to the jury, controlled the agreement between the parties. Furthermore, there is no evidence that the parties agreed to incorporate the attorney fee provisions in unsigned documents into their joint venture contract and Markoff was not an assignee or third party beneficiary of Aaronoff's purchase agreement. Thus, we need not address the issues raised in Aaronoff's appeal with regard to the amount of the award.

## II.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The purchase agreement*.

Aaronoff lived in a historically significant eight-unit building known as Chateau Colline. She learned that the owners of this 1930's building planned to demolish it to build a high-rise. To prevent the demolition, Aaronoff talked with historic preservation organizations about saving Chateau Colline. She conceived a solution by which she would purchase the property and convert the units into condominiums. Aaronoff projected a profit of at least $1 million. Aaronoff was a dance teacher with no real estate experience.

By December 19, 2001, Aaronoff had negotiated and executed a purchase and sale agreement and joint escrow instructions (the purchase agreement) with the owners of Chateau Colline. According to the agreement, Aaronoff was to place $100,000 into escrow and had 90 days to complete the purchase of the building for the price of $2,450,000. Aaronoff had the right to extend the escrow period up to 90 days, in exchange for payments totaling $50,000. Paragraph 8.2 of the purchase agreement gave Aaronoff the right to assign her rights and obligations under the agreement to others. However, any assignment by Aaronoff was subject to the seller's prior written consent.[1] There is no evidence that this agreement was assigned to Markoff.

The December 19, 2001, purchase agreement included an attorney fees provision in paragraph 8.4. It read: "<u>Attorneys' Fees</u>. In any action between Buyer and Seller and/or Escrow Holder seeking enforcement of any of the terms and provisions of this Agreement, or in connection with the Property, including, without limitation, any arbitration, appellate or bankruptcy proceeding, the prevailing party in those actions shall be awarded, in addition to taxable costs, damages, injunctive or other relief, its actual costs and expenses incurred in that action, including, but not limited to, its reasonable attorneys' fees."

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[1] The assignment clause is found in paragraph 8.2 of the purchase agreement. It reads: "<u>Assignability</u>. Buyer may assign its interest and right in and to this Agreement, or any portion thereof, or may nominate such other person or entity to take title to the Property or any portion thereof, as she may deem appropriate, provided, however, that (1) any person or entity to whom Buyer proposes to assign any of Buyer's interest hereunder or to serve as Buyer's nominee shall, concurrently with such assignment or nomination, assume each and all of Buyer's obligations hereunder, and (2) any such assignment or nomination by Buyer shall be subject to Seller's prior written consent (which consent shall not be unreasonably withheld). Any assignment or nomination by Buyer made in violation of this <u>Section 8.2</u> shall be null and void, and of no effect whatsoever. Any assignment or nomination by Buyer of its interest shall not be deemed to release the assignor from the obligations of Buyer hereunder."

Aaronoff deposited $100,000 into escrow. Thereafter, while she searched for investors to assist in purchasing Chateau Colline, she paid an additional $50,000 for two extensions thereby extending the closing date to June 20, 2002. Aaronoff's deposits would become nonrefundable on June 10, 2002.

B. *Aaronoff's dealings with Markoff.*

On April 24, 2002, a real estate developer introduced Aaronoff to Steven Markoff. Markoff's wife is Jadwiga Markoff. She authorized Markoff to act on her behalf. (Hereinafter, we refer to Steven Markoff as "Markoff," and when necessary, we refer to Steven and Jadwiga Markoff collectively as "the Markoffs.") Over the next few weeks, Aaronoff provided information to Markoff, they exchanged emails, and they talked on the telephone about Aaronoff's concept of purchasing Chateau Colline and converting the units into condominiums.

Around May 17, 2002, Markoff told Aaronoff that she needed to obtain an American Land Title Association (ALTA) title insurance policy on the property. Aaronoff told Markoff that she did not have $5,200 to pay for the policy.

On May 17, 2002, at Markoff's suggestion, Aaronoff picked up a $5,200 check from Markoff at his home. Markoff gave Aaronoff an one-page document to sign. Aaronoff and Markoff, for himself and on behalf of his wife, signed the contract.

Other than a provision waiving the parties' right to a jury trial, the May 17, 2002, contract read in full: "1. The parties to this agreement are Vidala Aaronoff . . . and Steve and Jadwiga Markoff . . . collectively called 'The Parties'. [¶] 2. The parties have agreed to the Real Estate purchase/Condo Conversion deal, 'subject to' [the Markoffs] completing their due diligence and verifying the information which is set out in the attached 5-page email dated May 10, 2002, and three pages of Proforma numbers given to [the Markoffs] by [Aaronoff], each hand-dated May 6, 2002. [¶] 3. Although [the Markoffs have] not yet completed the above referenced due diligence, [Aaronoff] has asked for $5,200 as good faith money, which [the Markoffs] have agreed to provide. [Aaronoff] will use the money to pay for the ALTA insurance policy on the subject property. [¶] 4. . . . [¶] 5. In the event [the Markoffs] do not go through with the deal because of what they find in due diligence, which includes not believing the Proformas to be sound, or because of any other material adverse event or finding, [Aaronoff] will return the $5,200 good faith deposit to [the Markoffs], without interest, within one year. In such an event [Aaronoff] would have all rights to the ALTA work. [¶] The above is the full and complete deal between the parties."

The five-page email referenced in, and attached to, the May 17, 2002 contract was a May 10, 2002 communication sent by Markoff to Aaronoff. The email discussed purchasing, and thereafter converting into condominiums, Chateau Colline. It covered such topics as costs, tax implications, steps required to complete the conversion, as well as the implications of the property being declared a historic building. The email stated in part: "I. Our deal (subject to our completing our due diligence, our verifying the information you have given us): [¶] A. [The Markoffs and Aaronoff] will form a venture (probably an LLC) and each will put up $150,000 in initial capital -- for a total of $300,000. *The $150,000 you have put up in escrow will be counted as your share.* [¶] B. [The Markoffs] will additionally provide loans in the amount of $2,474,250 ($2,774,250 less $300,000) needed for the venture. [Three supporting . . . [pages] *setting out . . . budgets and proformas* were given to [Markoff] on 5-6-02]. [¶] C. [Aaronoff] would like to close escrow on June 9 (6-10 is the last day you can get your deposit back). 6-20-02 is the last day to close per the escrow agreement. [¶] D. The venture will make condos of the subject property and sell them. [¶] E. [Aaronoff] will be in effect the 'General Manager of the project'; [Markoff will] be the 'somewhat' silent partner, board member, double check, gad fly. [¶] F. Profits from the R/E venture will be 31.10% for [Aaronoff] and 68.90% for [the Markoffs]. Additionally profits on the first $725,689.40 of profits from *any* tax credits *from the venture* will also be split 31.10%/68.90% and any profits above the $725,689.40 will be split on a 50%/50% basis." [¶] . . . [¶] III. Financial [¶]

The 25% down loan scenario is based on reports from high net worth individuals who reported receiving between 30% to 20% down loans with 4.5% to 6% interest rates. Washington Mutual has a 4.41% interest rate, fixed 6 mths, after 6 mths, Libor Index plus margin of 2.350%, nonrecourse loan."

Three pages of financial projections were also attached to the May 17, 2002, joint venture contract. These projections were called "Overview, Chateau Colline Projected Pro-Forma & Profit Allocation." There was no attorney fee provision in either the May 17, 2002, agreement or the email that was attached thereto and incorporated therein.

On May 31, 2002, Markoff sent Aaronoff an email proposing that the lender should not be Washington Mutual, as discussed in the May 17, 2002, contract, but rather Palm Finance Corporation (Palm), a company indirectly owned and funded by Markoff.

On June 6, 2002, Aaronoff confirmed by email that the terms of a loan from Palm "look good."

In June 2002, Markoff sent Aaronoff a number of documents. These documents, collectively referred to as the unsigned documents, included: (1) a loan agreement, (2) a promissory note, and (3) a limited liability company operating agreement for Castle on the Hill, LLC. These documents, and prior versions of some of them, included attorney fee provisions. However, these documents were *never executed*.[2] Furthermore, there is no evidence that both parties agreed to all of the essential provisions in these unsigned documents.[3]

The Markoffs did not send funds for the balance required to purchase Chateau Colline. The Markoffs did not contribute $150,000 in initial capital to a limited liability company.

On June 10, 2002, Aaronoff's $150,000 became nonrefundable. On June 19, 2002, Aaronoff sent Markoff a letter stating that Markoff had one hour to exchange signatures on proposed modifications to the May 17, 2002, joint venture contract, or she would consider their negotiations at an end.

On June 21, 2002, Aaronoff conveyed her rights under the December 19, 2001, purchase agreement to another real estate investor.

At some point, Aaronoff returned $5,200 to Markoff.

C. *The lawsuit.*

In February 2004, the Markoffs sued Aaronoff *alleging Aaronoff breached the May 17, 2002, joint venture contract*. The Markoffs admitted that during the course of discussing the project with Aaronoff, a number of draft documents had been discussed, but not signed. The Markoffs alleged that the parties agreed that Aaronoff would "continue to be obligated to perform the [joint venture] Agreement if the other written documentation could not be agreed upon." The

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[2] The draft limited liability company operating agreement stated in part, that "[the Markoffs and Aaronoff agree to form Castle on the Hill, LLC] to engage in the business of owning, managing and selling real estate and to transact any and all other business for which a limited liability company may be formed under California law. The initial property, commonly known as Chateau Colline Apartments . . . ." The LLC was never formed.

The parties also exchanged, *but did not execute*, a deed of trust and assignment. This document did not include an attorney fee provision.

[3] At oral argument, Aaronoff's attorney admitted there were disagreements between Aaronoff and the Markoffs on one or more of the terms of the unsigned documents.

Markoffs sought more than $1.7 million in contractual damages for loss profits, costs and post-judgment interest. They also sought attorney fees.

On November 9, 2005, Aaronoff filed a motion to file an amended answer. In opposing the motion, the Markoffs stated that their claims were based only on the May 17, 2002, contract and *not* on any of the unsigned documents.[4] The trial court initially denied the amendment motion. However, after we issued a peremptory writ of mandate, the trial court granted the motion to amend.

In August 2006, Aaronoff filed a motion for summary judgment. In opposing the motion, the Markoffs again stated they were *not* basing their complaint on any of the unsigned documents.[5] The trial court denied the motion.

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[4] In the opposition, the Markoffs's attorney stated in part: "The [Markoffs] simply claim that [Aaronoff] breached the Agreement, which was signed by Markoff and Aaronoff on May 17, 2002. The [Markoffs] have never claimed that the parties are bound by the terms contained in the unsigned drafts that were exchanged between the parties during the period after the [May 17, 2002,] Agreement was signed until June 19, 2002, when [Aaronoff] sold the Chateau Colline Project to a third party, rather than performing the Agreement with Markoff." The Markoffs further stated: "the written agreement signed by both Markoff and Aaronoff dated May 17, 2002, created an enforceable agreement between them and . . . Aaronoff breached that agreement by selling the Chateau Colline Property to a third party. There is no allegation, nor does Markoff contend, that any of those drafts exchanged after the Agreement was signed by Markoff and Aaronoff formed a contract between the parties."

[5] The Markoffs asserted in their opposition: "Aaronoff argues that the statute of frauds precludes enforcement of the parties' Joint Venture Agreement because she refused to sign the loan documents and the LLC agreement. While it is true that Aaronoff refused to sign those documents, those facts are completely irrelevant to this second summary judgment motion. [The Markoffs] are not attempting to enforce the proposed and unsigned loan documents or operating agreement and, therefore, the statute of frauds is not applicable . . . . The [Markoffs] are asking the Court to enforce the written Joint Venture Agreement that Aaronoff signed on May 17, [2002]. . . . Aaronoff's failure to sign the loan documents and LLC operating agreement is only of significance because Aaronoff breached her fiduciary duty resulting from the Joint Venture Agreement."

The case did not go to trial until May 21, 2007. Throughout the three years of litigation, Aaronoff had been represented by six different attorneys, some of whom were not attorneys of record, but had provided advice and assistance to Aaronoff throughout the litigation. Aaronoff represented herself at trial.

In a six-day jury trial, the Markoffs *claimed there was an enforceable joint venture contract formed on May 17, 2002*, they put up $5,200 in good faith, completed their due diligence, and they had made the required additional funding available through Palm. The Markoffs argued their contractual obligations to invest $150,000 and to provide a multi-million dollar loan (which was to be accomplished through Palm) were excused because Aaronoff transferred the property to a third party at a time when the Markoffs were ready, willing, and able to perform. The Markoffs sought an award to compensate them for their share of the expected profits.

Aaronoff claimed she had not entered into an enforceable joint venture contract on May 17, 2002, but rather she had agreed only to repay $5,200 loaned to her to enable her to pay for the ALTA policy. Aaronoff testified she fulfilled her only obligation under the parties' loan agreement by repaying the $5,200. In the alternative, Aaronoff contended that if the May 17, 2002, document was an enforceable contract, the Markoffs acted in bad faith and breached the contract by not timely funding the deal.

The jury found on special verdicts that Aaronoff and the Markoffs entered into a contract on May 17, 2002, the terms of the contract was clear, but that the Markoffs did not do substantially all of the significant things required by the contract and the Markoffs were not excused from complying. Judgment was entered in favor of Aaronoff.

D. *The motion for attorney fees.*

After the jury verdict, Aaronoff filed a motion seeking attorney fees as the prevailing party pursuant to Civil Code section 1717. She requested a total of

$210,288.25 representing fees she had incurred by using the six different attorneys throughout the three years of litigation.

The Markoffs opposed the attorney fee motion on the grounds that the May 17, 2002, contract did not contain an attorney fee provision and there were no other grounds for awarding Aaronoff attorney fees.

On October 9, 2007, the trial court ruled that Aaronoff was entitled to attorney fees as the prevailing party pursuant to Civil Code section 1717 and awarded Aaronoff $75,000. In issuing this award, the trial court stated in part: "[Civil Code section 1717 authorizes an award of attorney fees to] 'the party prevailing on the contract, whether he or she is the party specified in the contract or not[.]' . . . In this matter, the Court finds that throughout this litigation, both parties have relied upon a loan agreement, a promissory note, and a limited liability operating agreement, as part and parcel of the operative contract. Each of said documents contains attorney fees clauses. [¶] In the operative complaint [the Markoffs have prayed] for attorney fees. This allegation cuts both ways. See, e.g., *International Billing Services, Inc. v. Emigh* [(2000)] 84 Cal.App.4th 1175, 1191 ('A pleader should not be permitted to threaten a litigant with [the] prospect of an adverse attorney fees award and avoid the same fate if unsuccessful.') [¶] . . . [¶] [Aaronoff] sought to use her pro per status to her procedural and tactical advantage both prior to and during the course of trial. Her inability to afford counsel was highlighted for both the Court and the jury. . . . [T]he Court calculates reasonable attorney's fees as follows: $75,000.00 comprised of 300 hours at the reasonable rate of $250/hour."

Aaronoff filed a motion for reconsideration arguing the fee award was inadequate and the trial court had erred in calculating the amount of the award. Aaronoff requested a total attorney fee award of $240,844.50. On December 4, 2007, the trial court denied Aaronoff's motion for reconsideration.

E. *This appeal.*

The Markoffs do not appeal from the judgment entered against them with regard to liability. Rather, they appeal from the October 9, 2007, post-judgment order insofar as it awarded Aaronoff attorney fees. The Markoffs contend there is no legal basis to support the award.[6] Aaronoff appeals from the October 9, 2007, post-judgment order awarding her attorney fees and from the December 4, 2007, order denying her reconsideration motion. Aaronoff argues only that the amount of the attorney fee award was inadequate. The two appeals have been consolidated. Because we reverse the October 9, 2007, order insofar as it awarded Aaronoff attorney fees, we need not address the issues raised by Aaronoff in her appeal, which have become moot.

## III.

## DISCUSSION

A. *Introduction and standard of review.*

The trial court stated two reasons for the imposition of attorney fees against the Markoffs: (1) the Markoffs were held to the attorney fee clauses in the *unsigned* loan agreement and the *unsigned* promissory note; and (2) the Markoffs were estopped from claiming Aaronoff was not entitled to an attorney fee award because the Markoffs asked for attorney fees in the prayer of their complaint. We first examine these two reasons, concluding they cannot support the attorney fee award. However, because an award of contractual attorney fees is a legal issue which we review de novo, we then discuss whether there are other grounds for upholding the award. (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 448-449 ["The correct application . . . of statutory and case authority respecting awards of attorney's fees presents a question of law, which we address de novo."]; *Loduca v. Polyzos* (2007) 153 Cal.App.4th 334, 340 [legal

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[6] The trial court also awarded Aaronoff an award for other costs. The parties do not address this aspect of the October 9, 2007, order.

basis for attorney fee award is reviewed de novo]; *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16 [ruling or decision if correct on any theory will not be disturbed on appeal even if trial court gave erroneous reasons]; accord, *Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.)

B. *The statutory authority for awarding attorney fees.*

Code of Civil Procedure section 1032, subdivision (b) grants prevailing parties the right "to recover costs in any action or proceeding." Code of Civil Procedure section 1033.5, subdivision (a) states in pertinent part: "The following items are allowable as costs under Section 1032: . . . [¶] (10) Attorney fees, when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law."

Civil Code section 1717 is designed to guarantee mutuality of remedies for claims of contractual attorney fees. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1113.) Civil Code section 1717, subdivision (a) states, "[i]n any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

Pursuant to Civil Code section 1717, and as discussed in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 at pages 128 to 129, " 'when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed.' [Citation.]" (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 678; see also, *Scott Co. v. Blount, Inc., supra*, 20 Cal.4th at pp. 1113-1114.)

C. *The reasons proffered by the trial court cannot support the attorney fee award as they are not supported by the evidence.*

1. *Markoff is not bound by the attorney fee provision in the unsigned documents.*

After Aaronoff and the Markoffs formed an enforceable joint venture contract on May 17, 2002, they continued to negotiate additional terms of their relationship. As part of these negotiations, the parties exchanged drafts of the unsigned documents that were never executed. One reason proffered by the trial court in issuing the attorney fee award was based upon the unsigned documents.[7] The trial court concluded that these documents were part and parcel of the parties' May 17, 2002, contract and therefore, the parties were held to the attorney fee provisions in them. However, this factual finding is not supported by the record.

Aaronoff presents a number of arguments in support of the trial court's ruling. She notes that when parties so intend, they may be held to provisions in unsigned documents if they have become part of the parties' agreement. (Civ. Code, § 1642 [several contracts relating to the same matter, between the same parties and made as parts of one transaction are taken together]; *Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, 378-380 [commercial purchasing contract between manufacturer and a dealer; original agreement has no attorney fee provision, but parties are held to attorney fee provision in subsequent invoices, to which dealer has agreed to be bound, as parties were merchants bound by the California Uniform Commercial Code].) Aaronoff suggests the Markoffs are bound by the attorney fee provisions in the unsigned documents because Markoff argued at trial that these documents had become part of the joint venture agreement. However, the record contradicts this contention.

In opposing pre-trial motions, the Markoffs consistently stated they were suing *only* on the May 17, 2002 contract. This is consistent with Markoff's

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[7] The trial court only referenced two of these unsigned documents.

complaint, his pleadings and his trial testimony. Markoff testified that in order to be a responsible party to the joint venture agreement to develop real property and to effectively implement the May 17, 2002, contract, it was expected additional documents, such as a promissory note, security agreement, and deed of trust *would be* executed. However, while these additional documents were drafted, they were never finalized or executed, and there is no evidence that the parties ever agreed upon the terms to be included therein. The Markoffs and Aaronoff were not even designated as parties to the loan agreement and promissory note, and no loan was ever made. Rather, the drafts of loan agreement and promissory note have the parties as Palm and Castle on the Hill. Neither the Markoffs nor Aaronoff demonstrated an intent to be bound by the unsigned documents. (*Pilcher v. Wheeler* (1992) 2 Cal.App.4th 352, 353-355 [attorney fee request denied where partnership agreement did not contain an attorney fee provision even though unsigned construction contract contained an attorney fee provision as parties did not intend the two documents to form a single transaction].) Further, the May 17, 2002, contract included an integration clause stating that it was the "full and complete deal between the parties" signifying that no additional terms were to be included in the contract. Thus, the parties cannot be held to the attorney fee provision in the unsigned documents.

Aaronoff further argues that Markoff is bound by the attorney fee provisions in the unsigned documents because in California, parties may orally agree to the terms of a contract. However, Aaronoff has not cited to the record to show that the parties orally agreed to add an attorney fee provision to the May 17, 2002, joint venture contract, or that the parties orally agreed to any specific provision in the unsigned documents, such as the attorney fee clauses. Thus, it is not factually supportable to conclude that the parties agreed to the attorney fee provision, or other terms contained in the drafts of the unsigned documents.[8]

Aaronoff further asserts that Markoff is bound by the attorney fee provisions in the unsigned documents because he argued below that there was an enforceable joint venture agreement, that in California a joint venture agreement may contain terms that are not in writing, and the trial court so instructed.[9] However, as we have stated above, Aaronoff has not pointed to any evidence showing that the parties orally agreed to add an attorney fees provision to the May 17, 2002, contract.[10]

Thus, the trial court's conclusion that the parties agreed to incorporate the unsigned documents into the enforceable May 17, 2002, joint venture contract has no factual basis.

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8 We acknowledge there is one exception. In a June 6, 2002, email Aaronoff acknowledged being responsible for 31.10 percent of the Palm loan and a corresponding percentage of the profits. Markoff testified that this document signified that Aaronoff had agreed to modify the May 17, 2002, contract so Palm, and not Washington Mutual, would be the lender. But, Aaronoff's acceptance of Palm as the lender did not bind her, or Markoff, to the attorney fee provisions in the unsigned documents.

9 The trial court instructed: "The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details. A joint venture may be formed by a verbal or written agreement or it may be assumed as a reasonable deduction from the acts and declaration of the parties."

10 During deliberations, the jury asked: "If we agree there was a 'contract' on 5/17/02, may we find that the contract was invalidated by subsequent demands which were not listed (outside the scope) in the 5/17/02 agreement?" Aaronoff suggests this inquiry demonstrates Markoff "had argued and testified that there had been a modification of the 'deal' with Ms. Aaronoff beyond the mere 'four corners' of the May 17, 2002 Agreement." However, by this suggestion, Aaronoff asks us to speculate as to the jury's thinking.

2. *The doctrine of estoppel does not preclude the Markoffs from arguing against an attorney fee award.*

In their complaint, the Markoffs prayed for an award of attorney fees. The trial court concluded the Markoffs could not make that request in their complaint, and yet oppose Aaronoff's motion for attorney fees. Aaronoff concedes that this rationale cannot support the trial court's award because recent authorities, including *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858 at pages 898 to 899, hold that an attorney fee award cannot be assessed against a party merely because that party claimed such fees in their complaint. *Blickman* rejected the holding in *International Billing Services, Inc. v. Emigh, supra,* 84 Cal.App.4th 1175.

*Blickman* is consistent with our opinion in *Sessions Payroll Management, Inc. v. Noble Construction Co., supra,* 84 Cal.App.4th 671. In *Sessions,* we rejected "the theory that alleging the right to attorney fees in its complaint estops [the losing party plaintiff] from now claiming that it could not have recovered them and that therefore [the victorious defendant] should not receive them. This estoppel theory is not consistent with the California Supreme Court's test in *Reynolds Metals Co. v. Alperson*[, *supra,*] 25 Cal.3d 124 for determining the entitlement to contractual attorney fees." (*Sessions Payroll Management, Inc. v. Noble Construction Co., supra,* at pp. 674-675.)

Thus, the trial court erred in awarding Aaronoff attorney fees based upon estoppel.

Because the reasons proferred by the trial court to support the attorney fee award are not sound, we now turn to whether, as a matter of law, the award is supportable pursuant to other theories.

D. *Other theories do not support the attorney fee award.*

The purchase agreement signed by Aaronoff and the sellers of Chateau Colline on December 19, 2001, contained an attorney fee award. Aaronoff contends the following two theories bind the Markoffs, who are not signatories to that contract, to the attorney fee provision in the purchase agreement: (1) the Markoffs were third party beneficiaries of the purchase agreement; and (2) the Markoffs were assignees of the purchase agreement. These arguments are not persuasive.

1. *The Markoffs were not third party beneficiaries of the purchase agreement.*

In some situations, nonsignatories may be ordered to pay attorney fees to a signatory of a contract when the nonsignatory was a third party beneficiary of the contract in which there was an attorney fee provision. If the third party beneficiary could enforce the attorney fee provision in a contract, then the third party would be liable for those fees.

" 'A third party beneficiary may enforce a contract made expressly for his or her benefit. [Citation; Civ. Code, § 1559.] It is also true that a party not named in the contract may qualify as a beneficiary under it where the contracting parties must have intended to benefit the unnamed party and the agreement reflects that intent. [Citation.]' " (*Loduca v. Polyzos, supra,* 153 Cal.App.4th at p. 341.) However, " '[a] third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him. [Citations.] As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler. Permitting a third party to enforce a covenant made solely to benefit others would lead to the anomaly of granting him a bonus after his receiving all intended benefit.' [Citation.]" (*Sessions Payroll Management, Inc. v. Noble Construction Co., supra,* 84 Cal.App.4th at p. 680.) The determination as to whether a third party beneficiary is a question of interpreting the written contract. (*Loduca v. Polyzos, supra*, at p. 341.)

As we discussed above, the mutuality concepts of Civil Code section 1717, will be applied in actions involving signatory and non-signatory parties with regard to the imposition of attorney fees. (*Reynolds Metals Co. v. Alperson, supra,* 25 Cal.3d at pp. 128-129.) As potentially pertinent here, these concepts are applicable " '[w]here a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed.' [Citation.]" (*Sessions Payroll Management, Inc. v. Noble Construction Co., supra,* 84 Cal.App.4th at p. 679.)

Here, the purchase agreement signed by Aaronoff included an attorney fee provision. However, it did not state that the deal between Aaronoff and the sellers of Chateau Colline was being made for the benefit of the Markoffs. Additionally, there are no facts showing that the purchase agreement was designed or written to benefit the Markoffs. Rather, the purchase contract was executed before the Markoffs were in the picture and there are no indications that the sellers even knew of the Markoffs's existence; thus, the sellers and Aaronoff could not have devised the purchase agreement to benefit the Markoffs. Lastly, the attorney fee provision in the purchase agreement was limited to "any action between Buyer [Aaronoff] and Seller and/or Escrow Holder seeking enforcement of any of the terms and provisions of [the purchase agreement] . . . ." The litigation by the Markoffs did not fit into this description.

Thus, had the Markoffs been the prevailing party in their case against Aaronoff, the Markoffs would not have been able to recover attorney fees under a third party beneficiary theory. (Compare with *Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375 [lease between lessor and lessee includes attorney fee provision and specific provision that sublessee will run the property; lessor sought to terminate the lease; lessor sought attorney fees after it successfully defended itself in an action brought by the sublessee; lessor is entitled to attorney fees against nonsignatory sublessee because applying reciprocity test, the sublessee could have recovered attorney fees under the contract as a third party beneficiary had the sublessee won the lawsuit as the lease specifically designated sublessee as the entity who would operate the property].)

Thus, the Markoffs are not obligated to pay attorney fees under a third party beneficiary theory.[11]

2. *The Markoffs are not assignees of the purchase agreement.*

In some situations, nonsignatories of a contract may be ordered to pay attorney fees to a signatory of a contract that includes an attorney fee provision when the nonsignatories were assignees of the contract. Citing *California Wholesale Material Supply, Inc. v. Norm Wilson & Sons, Inc.* (2002) 96 Cal.App.4th 598 (*California Wholesale*), Aaronoff argues this theory supports her entitlement to attorney fees. This argument is unavailing.

In *California Wholesale,* a drywall subcontractor, Johnwall, was indebted to the Bank and CalPly, a supplier. As security for these debts, Johnwall assigned all his accounts receivables first to the Bank and second to CalPly. (*California Wholesale, supra,* 96 Cal.App.4th at pp. 601-602.) Johnwall later entered into a contract with a general contractor, Wilson. The contract between Wilson and Johnwall had an attorney fee provision. This contract became subject to the assignment to the Bank and CalPly. As a result of Johnwall's work, Wilson owed Johnwall $42,970. Entitlement to this receivable was the subject of a dispute between the Bank's assignee and CalPly. Wilson paid the whole amount to the Bank's assignee on the theory that its UCC statement was filed first and therefore its lien was senior. (*Id.* at pp. 602-603.) CalPly sued Wilson. The trial agreed the Bank's lien was senior and that Wilson had properly paid the entire amount to the

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[11] We also find unpersuasive Aaronoff's argument that Markoff is liable for attorney fees because Markoff was the third party beneficiary of the unsigned loan agreement and the promissory note. The unsigned loan agreement and promissory note were not executed. Markoff did not claim to be a third party beneficiary of these documents. And, the loan was never made. Markoff could not have based a lawsuit on these draft documents.

Bank's assignee. Judgment was entered against CalPly. Wilson then sought to recover attorney fees from CalPly based on the attorney fee provision of the Wilson/Johnwall contract. Wilson also argued CalPly was responsible for attorney fees as the assignee of Johnwall's accounts receivable. (*Ibid.*) The trial court denied the Bank's motion for attorney fees agreeing with CalPly that the lawsuit was not based on the Wilson/Johnwall contract and therefore the Bank could not rely on its attorney fee provision. (*Id.* at pp. 603-604.) We reversed. (*Id.* at p. 611.)

We found that by virtue of Johnwall's assignment to CalPly, the former assigned all of its rights in the Wilson/Johnwall agreement including the attorney fee provision. We reasoned therefore, that when CalPly sued Wilson, it was bound by the attorney fee provision. (*California Wholesale, supra,* 96 Cal.App.4th at pp. 606-608.)

In contrast, Markoff was not suing as an assignee of the purchase contract. The Markoffs did not sue Aaronoff seeking specific performance of the purchase agreement and they did not assert that the Chateau Colline should be transferred to them. Rather, the Markoffs sued on the joint venture agreement and sought loss profits. Additionally, while the record reflects Aaronoff submitted the Markoffs's names to the sellers as potential investors who might be taking title with her, the record does not reflect that the sellers provided written consent to any assignment, as required under the purchase agreement. (See fn. 1.) Had the Markoffs been successful in their lawsuit against Aaronoff, they would not have been entitled to attorney fees based upon the attorney fee provision in the purchase agreement. (*Reynolds Metals Co. v. Alperson, supra,* 25 Cal.3d at p. 128 [nonsignatory to contract held to attorney fees provision in the contract only when he or she would have been entitled to an award of attorney fees should he or she have prevailed].)

Thus, attorney fees cannot be awarded to Aaronoff under an assignment theory.

In light of our conclusion that there were no grounds to support the attorney fee order, we need not address the issues raised by Aaronoff in her appeal, which have become moot.[12]

IV.

DISPOSITION

The order of October 9, 2007, is reversed insofar as it awarded attorney fees to Aaronoff. In all other respects, the October 9, 2007 order is affirmed. Aaronoff's appeal from the orders of October 9, 2007, and December 4, 2007, is moot and dismissed. Costs on appeal are awarded to the Markoffs.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

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12 We decline the Markoffs's request for attorney fees on appeal.